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5 **EPIC GAMES, INC.,**

6 Plaintiff,

7 vs.

8 **APPLE INC.,**

9 Defendant.

10
11 **AND RELATED COUNTERCLAIM**

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13 Case No. 4:20-cv-05640-YGR

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16 **PRETRIAL ORDER NO. 8 RE:**
17 **ADMINISTRATIVE MOTION TO SEAL THE**
18 **COURTROOM DURING PRESENTATION OF**
19 **CERTAIN CONFIDENTIAL MATERIAL AT**
20 **TRIAL**

21
22 Dkt. No. 515

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24 **TO ALL PARTIES AND COUNSEL OF RECORD:**

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28 The Court is in receipt of a Motion to Seal the Courtroom During Presentation of Certain
Confidential Material at Trial, filed by Defendant Apple Inc. (Dkt. No. 515.) Apple requests that
the courtroom be closed during discussions of its App Store's profitability, as analyzed by Epic
Games' accounting expert, Ned S. Barnes. In addition to closing the courtroom for the entirety of
Mr. Barnes' testimony, Apple requests that the courtroom be closed for any fact or expert witness
testimony "addressing the subject matter of Mr. Barnes' opinions or the documents on which he
relied" or "adopting or responding to Mr. Barnes' opinions." Apple also seeks to prevent Epic
Games from mentioning the topic in its opening statements or in demonstratives.

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32 Apple seeks to justify these restrictions under a novel theory that investors might
33 misinterpret the financial analysis and grow "confused." While Apple is correct that non-public
34 financial information is frequently subject to sealing, courts do so not because the information
35 may confuse investors, but because it can create competitive harm. *See Apple Inc. v. Samsung*
Elecs. Co., Ltd., 727 F.3d 1214, 1225-26 (Fed. Cir. 2013).

1 The question of whether, and if so, to what extent, supra-competitive profits exists in a
 2 relevant market is evidence of market power. *See Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1252
 3 (11th Cir. 2002). Such information is highly probative in an antitrust case. The Court knows no
 4 case where an expert's profitability analysis has been sealed where the expert's opinion reflects
 5 their own independent analysis.¹ While the underlying information is sealable, the conclusion is
 6 not.

7 To the extent that Apple disagrees with the analysis, it will have ample opportunity to
 8 cross-examine Mr. Barnes and explain why the analysis is wrong. As is set forth herein, to the
 9 extent that properly sealed financial information is necessary to cross-examine an expert, the Court
 10 will consider sealing the courtroom for those short periods of time. The Court will discuss other
 11 alternatives which may exist to address this issue. The request for a blanket sealing as to Mr.
 12 Barnes' testimony is therefore **DENIED**.

13 With respect to the written direct testimony of Mr. Barnes, the Court rules as follows on
 14 Apple's sealing request:

16 PARAGRAPH(S)	17 RULING
17 2, 4	18 DENIED
18 5	19 GRANTED
19 Figure on Page 3	20 GRANTED
20 6-7	21 DENIED
21 8	22 GRANTED IN PART AND DENIED IN PART: The 23 last sentence is sealed; the earlier sentences 24 shall be unredacted.
22 Figure on Page 5	23 GRANTED
23 9	24 GRANTED IN PART AND DENIED IN PART: The 25 second sentence is sealed; the other sentences 26 shall be unredacted.
24 10	25 GRANTED IN PART AND DENIED IN PART: The 26 sentences following the first sentence are

25 _____
 26 ¹ Apple's cited cases are inapposite. In the closest case, a party sought to seal a proprietary
 27 drug study that showed a potential link between the drug and pancreatic cancer. *In re Incretin-
28 Based Therapies Prod. Liab. Litig.*, No. 13-MD-2452, 2021 WL 873290, at *3 (S.D. Cal. Mar. 9,
2021). The study was preliminary, and, notably, the court had already considered and rejected it
as insufficient to show a causal link. *Id.*

United States District Court
Northern District of California

1		sealed. The first sentence shall be unredacted.
2	11	GRANTED IN PART AND DENIED IN PART: The last sentence is sealed; the other sentences shall be unredacted.
3	12	GRANTED IN PART AND DENIED IN PART: The entirety of this paragraph is sealed except for the first, second, and fifth sentences, which shall be unredacted.
4	Figure on Page 7	GRANTED IN PART AND DENIED IN PART: The figure is sealed; the redaction in the caption shall be unredacted.
5		
6	13	DENIED
7	Figure on Page 8	GRANTED
8	14-15 (including Footnote 1)	DENIED
9	16 and Figure on Page 9	GRANTED
10	17	DENIED
11	18	GRANTED IN PART AND DENIED IN PART: The third sentence is sealed; the other sentences shall be unredacted.
12	Figure on Page 10	GRANTED
13	19	GRANTED IN PART AND DENIED IN PART: The last sentence is sealed; the other sentences shall be unredacted.
14	Figure on Page 11	GRANTED
15	20-21, 25	GRANTED
16	27	GRANTED IN PART AND DENIED IN PART: The first redacted sentence is sealed; the second redaction shall be unredacted.
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18 This Order terminates Docket Number 515.

19 **IT IS SO ORDERED.**

20 Dated: April 30, 2021

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22 YVONNE GONZALEZ ROGERS
23 UNITED STATES DISTRICT JUDGE